UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION, MARK NEWBY, et al., Plaintiff, vs. ENRON CORP., et al., Defendants.	MDL 1446 and Consolidated, Related and Coordinated Cases Civil Action No. H-01-3624 and Consolidated, Related and Coordinated Cases

SUPPLEMENTAL MEMORANDUM OF DEFENDANTS BANK OF AMERICA CORPORATION AND BANC OF AMERICA SECURITIES LLC IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT

Defendants Bank of America Corporation ("BAC") and Banc of America Securities LLC ("BAS") respectfully submit this Supplemental Memorandum in Further Support of their Motion to Dismiss the First Amended Consolidated Complaint ("FAC") in Newby v. Enron, Case No. H-01-3624 (S.D. Tex.) ("Newby"). In light of this Court's Memorandum and Order re Merrill Lynch and Deutsche Bank Entities, dated March 29, 2004 ("Deutsche Bank Order") and its Memoranda and Orders re Lehman Defendants' and Barclays Defendants' Motion to Dismiss, dated March 31, 2004 ("Lehman Order" and "Barclays Order"), Defendants BAC and BAS respectfully submit this memorandum in further support of their argument that the claims against BAS in the FAC are barred by the statute of limitations because BAS is in a demonstrably different position than Deutsche Bank, Lehman and Barclays. BAC and BAS's statute of limitations arguments

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were more fully described in their Memorandum in Support of Motion to Dismiss dated June 19, 2003 (#1533) ("Moving Brief") and Reply Memorandum in Further Support thereof dated July 31, 2003 (#1605) ("Reply Brief").

In the Deutsche Bank, Lehman and Barclays Orders, this Court implicitly determined that the claims under Section 12(a)(2) of the Securities Act of 1933 in the FAC against those defendants were time barred. The Section 11 and 12(a)(2) claims against BAS, which were first made in the FAC, should nonetheless be dismissed as time-barred because the reasoning in those Orders does not apply to BAS. Since the Section 15 claim against BAC is derivative of the claims against BAS, that claim should also be dismissed.

As shown below and in the Moving and Reply Briefs, the newly alleged claims against BAS in the FAC do not relate back to the filing of the Consolidated Complaint on April 8, 2002 because Plaintiffs admit that their failure to name BAS as a defendant in the Consolidated Complaint was not the result of a mistake. Rather, Plaintiffs admitted in their Opposition to BAC's Motion to Dismiss the Consolidated Complaint that they made a conscious and strategic decision to name only BAC as a defendant in that complaint. In addition, BAC and BAS, unlike Deutsche Bank, Lehman and possibly other financial institutions, did not remain silent as to which Bank of America entity was the appropriate party. Rather, BAC placed Plaintiffs on notice that they had sued the wrong party and identified BAS as the appropriate party at their earliest opportunity on May 8, 2002, when BAC filed its Memorandum of Law in Support of its Motion to Dismiss the Consolidated Complaint. BAC also filed a motion for summary judgment on April 30, 2003 asserting that it was not a proper party.

Also in contrast to the facts described in the Deutsche Bank, Lehman and Barclays Orders, Lead Counsel for Lead Plaintiff wrote to BAS on September 20, 2002 to advise BAS that "[o]ur continuing investigation reveals a basis for naming Banc of America Securities LLC as a defendant." The letter requested that BAS enter into a tolling agreement or "we will have to name Banc of America Securities LLC as a defendant on or before October 16, 2002" because a defendant could argue that the statute of limitations would expire on that date. Despite Plaintiffs' acknowledgement that the statute of limitations as to BAS might expire on October 16, 2002 and despite their threat that they would sue BAS if BAS did not enter into a tolling agreement, Plaintiffs delayed naming BAS as a defendant until May 14, 2003.

Therefore, this Court's determination that the FAC's addition of the bank subsidiaries should be deemed filed as of their January 14, 2003 letter to the Court should not apply to BAS. The Court's response to that letter was not the cause of Plaintiffs' delay in suing BAS. They had already affirmatively decided, for reasons known only to themselves, not to sue BAS despite their threat and their acknowledgement that the statute of limitations might run on October 16, 2002. When Plaintiffs threatened to sue BAS in September 2002 they were not concerned about the Court's scheduling orders or obtaining the Court's permission. Plaintiffs should not be permitted to avoid dismissal of their claims against BAS because they purportedly "relied on the Court's determination that in the interests of efficiency and avoidance of repeated amendments, the complaint should not be amended until all the original motions to dismiss were resolved and the Court had identified all pleading deficiencies that required supplementation." Deutsche Bank Order at 74.

With respect to BAS, it was not the Court's determination that caused any delay on Plaintiffs' part. Plaintiffs had already delayed suing BAS despite the threat in their September 20, 2002 letter and their acknowledgement that the statute of limitations would arguably run on October 16, 2002. It is unfair to allow Plaintiffs to hide behind the Court's response to their January 14, 2003 letter because that is not what induced Plaintiffs to wait to file against BAS.[1] In the case of BAS, justice would not require that Plaintiffs' January 14, 2003 letter be deemed to constitute an amendment. See Fed. R. Civ. Proc. 15(a). This Court should determine that the May 14, 2003 filing of the FAC, and not January 14, 2003 should be the date on which BAS was added as a defendant.

A. Plaintiffs' Claims Against BAS do not Relate Back to the Filing of the Consolidated Complaint

As shown below and in BAC and BAS's prior submissions, since Plaintiffs' failure to assert claims against BAS prior to the filing of the FAC on May 14, 2003 was not the product of mistake, those claims do not relate back to the filing of the Consolidated Complaint.

In discussing whether the newly added Section 12(a)(2) claims against Deutsche Bank in the FAC were timely, this Court "considered as significant factors that Lead Plaintiff's lack of knowledge was allegedly caused by (1) the complex corporate structure of similarly named entities with identity of interests which the parent company, Deutsche Bank AG, did not unravel for Lead Plaintiff [and] (2) the absence of discovery to determine legally responsible entities . . . ." Deutsche Bank Order at 65; see also id. at 3 n.4 (observing that there had been changes in the corporate structure of the Deutsche

[1] As described below, Plaintiffs did not seek the Court's permission when it filed the Pulsifer complaint on August 9, 2002 allegedly due to statute of limitations concerns.

Bank entities between 1999 and 2002). The Court also noted that "While the Bank Defendants claimed this was a case of mistaken identity in their pleading motions and answers in response to the Consolidated Complaint, most did not divulge the identities of the culpable subsidiaries. Deutsche Bank is one of those who kept silent." Deutsche Bank Order at 62.

As noted above, BAC placed Plaintiffs on notice that they had sued the wrong party in its Moving Brief dated May 8, 2002, only one month after Plaintiffs filed their Consolidated Complaint. The Moving Brief also identified BAS, BAC's investment banking subsidiary, as the entity that had participated in the transactions at issue. See Moving Brief at 11; Reply at 13. Therefore, Plaintiffs did not need any discovery to determine the appropriate Bank of America party.

In their Opposition to BAC's Motion to Dismiss the Consolidated Complaint, dated June 10, 2002 ("Opposition"), ***Plaintiffs conceded that they had not made a mistake*** in suing BAC and not BAS. Plaintiffs asserted:

> Bank America suggests we sued the wrong party. We think not. The alleged fraudulent scheme involved ***both*** Bank America's investment banking ***and*** commercial operations, i.e., it is not limited to the actions of Bank America's securities subsidiary. Thus, because the liability of Bank America flows from the activities of both its commercial and investment banking operations, naming the parent corporate entity – which after all, is legally responsible for the operations and conduct of its subsidiaries – seems appropriate.

Plaintiffs' Opposition to BAC's Motion to Dismiss at p. 3 n.6; see also Reply at 13 (quoting same). Therefore, there can be no dispute that Plaintiffs had actual notice that BAS was the entity that engaged in the transactions and yet made a conscious decision not to name BAS. Although their Opposition unequivocally affirmed their decision to

name the parent corporate entity, the FAC names BAC only in the control person count. BAC did not induce and cannot be held responsible for the delay in Plaintiffs' change of heart.

In addition, as discussed in BAC and BAS's Moving Brief, Plaintiffs identified BAS by name in the Consolidated Complaint filed on April 8, 2002. See Moving Brief at 11. Plaintiffs described BAC as "a large integrated financial services institution that through its controlled subsidiaries and divisions (such as Banc of America Securities) . . . provides commercial and investment banking services . . . ." Consolidated Cplt. ¶ 104. All of the transactions as to which BAS ultimately was sued were identified in the Consolidated Complaint as transactions in which BAC, defined to include BAS, was involved. As described in the Moving Brief and Reply Brief, the Consolidated Complaint alleged that "Bank America," which was defined to include BAS, acted as an underwriter of the Enron 7% Exchangeable Notes and Enron 7.375% Notes and asserted Section 11 claims against BAC based on those offerings. Id. ¶¶ 776, 1006. The FAC now asserts these Section 11 claims against BAS, but not BAC. FAC ¶ 1006. Since the Consolidated Complaint referenced the offering documents for these Notes, and alleged that "Bank America" acted as an underwriter, Plaintiffs undoubtedly saw these offering documents. See Moving Brief at 16; Reply Brief at 18; Consolidated Cplt. ¶¶ 781, 786, 1007-1007, 1013. The offering documents for these Notes prominently listed BAS, not BAC as the underwriter or initial purchaser and were publicly available in October 2001. See Moving Brief at 15 & n.8.

Although the Consolidated Complaint did not assert a claim against BAC based on the Marlin Notes offering, it alleged that "Bank America," which was defined to include BAS, served as an "underwriter" of certain Enron-related securities including "$1

billion 6.31% and 6.19% senior notes in Marlin Water Trust-II and Marlin Water Capital-II." Consolidated Cplt. ¶ 777. The Consolidated Complaint also alleged that the Marlin Notes transactions were part of Enron's fraud. Id. ¶¶ 83(ii), 497, 498. This demonstrates that Plaintiffs were aware of a possible claim regarding the Marlin transaction as early as April 2002 but did not allege such a claim until May 2003. The offering documents for the Marlin Notes prominently listed BAS, not BAC as the initial purchaser and were publicly available in October 2001. See Moving Brief at 15 & n.8. Thus, Plaintiffs' claim against BAS with respect to the Marlin Notes is also time-barred. Moreover, none of Plaintiffs' claims against BAS relate back to the filing of the Consolidated Complaint.

Further, unlike Deutsche Bank and Lehman, BAC filed a motion for summary judgment in response to this Court's December 20, 2002 and January 27, 2003 Orders directing the bank defendants to file additional motions to dismiss if they wished to assert that an inappropriate party had been sued. BAC sought dismissal on the ground that it was not a proper party to this lawsuit. See Reply Brief at 12, 26. Barclays filed such a motion but later withdrew it. As previously noted, however, Plaintiffs already had actual notice by May 8, 2002 that they had sued the wrong party and Plaintiffs had threatened to sue BAS by October 16, 2002 if BAS did not agree to a tolling agreement. For reasons known only to Plaintiffs, they chose not to sue BAS by October 16, 2002. As noted in prior submissions, Plaintiffs were on inquiry notice even earlier.

Since the First Amended Complaint which added BAS as a defendant was filed on May 14, 2003, more than one year after the Consolidated Complaint was filed and BAC informed Plaintiffs that they had sued the wrong party, and more than one and one half years after Enron announced the SEC investigation and restatement, the claims against BAS all fall well beyond the expiration of the one year "discovery" prong of the

statute of limitations. Moreover, with respect to Plaintiffs' Section 11 claims, the Registration Statements and Prospectuses in which Plaintiffs claim BAS made misrepresentations and omissions were effective as of May 19, 1999 and August 10, 1999, respectively, more than three years before Plaintiffs filed the First Amended Complaint naming BAS. Accordingly, all of the claims asserted against BAS and BAC in the FAC are time-barred and should be dismissed.

B. This Court's Determination that January 14, 2003 Was the Date that the FAC was Filed Does Not Apply to BAC and BAS

In discussing whether the Section 12(a)(2) claims against Deutsche Bank Securities Inc. were timely, this Court stated that Lead Plaintiff relied on certain defendants' failure to file motions to dismiss on the grounds that the wrong entity had been sued, as requested by this Court's Orders dated December 20, 2002 and January 27, 2003. The Court also suggested that defendants who failed to file such motions might be equitably estopped from raising a statute of limitations defense. See Deutsche Bank Order at 73. As discussed above, however, BAC apprised Plaintiffs that they had not named the appropriate entity and indicated that BAS was the appropriate party on May 8, 2002. BAC also filed a motion for summary judgment pursuant to this Court's orders on the grounds that it was not a proper defendant. Thus, BAC and BAS cannot be equitably estopped from asserting the statute of limitations defense since BAC first raised the issue that Plaintiffs had sued the wrong entity more than one year before the FAC was filed.

Plaintiffs' assertion that they delayed asserting claims against BAS until this Court ruled on all of the motions to dismiss is disingenuous, however, since Plaintiffs contacted BAS by letter in September 20, 2002 to request that BAS enter into a tolling

agreement with Plaintiffs. Plaintiffs stated as follows in that letter:

> Our continuing investigation reveals a basis for naming Banc of America Securities LLC as a defendant. While we believe that the Sarbanes-Oxley legislation extends the statute of limitations to two years from the date of actual knowledge of a claim, there exists the possibility that a defendant could argue that the statute of limitations expires in mid-October of this year. Thus, in an abundance of caution, absent a tolling agreement signed by Banc of America Securities LLC, we will have to name Banc of America Securities LLC as a defendant on or before October 16, 2002.

Exhibit I to Reply Appendix.[2] BAS refused to enter into a tolling agreement. For reasons known only to Plaintiffs, Plaintiffs affirmatively chose not to name BAS as a defendant on or before October 16, 2002 despite their threat, but rather waited until May 14, 2003. The September 20, 2002 letter demonstrates that Plaintiffs were aware of their claims against BAS and recognized that those claims might expire in less than a month. In any event, as previously described, BAC made Plaintiffs aware of their claims against BAS on May 8, 2002 but Plaintiffs chose not to sue BAS until May 14, 2003, more than one year later. For Plaintiffs to now claim that they delayed suing BAS due to the Court's response to their January 14, 2003 letter is disingenuous in light of their September 2002 letter to BAS. We note that BAS is the only financial institution

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[2] This Court has held that the Sarbanes-Oxley Act does not apply to the FAC. See Memorandum and Order re Imperial County Employees Retirement System's Motion to Intervene, dated February 25, 2004, at 40. Thus, the statute of limitations on Plaintiffs' Section 12(a)(2) claim is governed by Section 13 of the Securities Act of 1933, which provides that "[n]o action shall be maintained to enforce any liability created under section [11] or [12](a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m (2004). In their September 20, 2002 Letter to BAS, Plaintiffs conceded that they arguably were on inquiry notice of their claims against BAS on October 16, 2001, when Enron "shocked the markets with revelations of $1.0 billion in charges and a reduction of shareholders' equity by $1.2 billion." FAC ¶ 61. As previously noted, the offering documents for the transactions at to which BAS has been sued were publicly available at that time.

defendant that noted in its motion to dismiss papers that it had received such a letter from Plaintiffs but refused to enter into a tolling agreement.

Plaintiffs' suggestion that they "relied on the Court's schedule and the Bank Defendants' silence in deciding when to amend the Consolidated Complaint" (Opp. at 15) rings hollow as to their claims against BAS. The Court's earlier schedule and orders obviously did not stop Lead Plaintiff from filing the Pulsifer complaint on August 9, 2002, allegedly due to statute of limitations concerns. See Plaintiffs' Opposition to Certain Defendants' Motion to Strike the Pulsifer Complaint, dated October 17, 2002, at 2. Nor could the Court's later orders be the reason Plaintiffs did not sue BAS in October 2002 in accordance with their threats.

Indeed, when certain defendants argued that the Pulsifer Complaint violated the Court's scheduling orders and constituted "an impermissible unauthorized amendment" to the Consolidated Complaint, Lead Plaintiff argued that "[n]one of the prior Orders of this Court bars The Regents or any other plaintiff from filing complaints to avoid the running of a statute of limitations, and any such result would be illogical." Id. Plaintiffs continued, "[t]here is nothing in the August 5, 2002 Order, or other Orders of this Court, that would require claimants to defer the filing of valid claims, while statutes of limitations run, pending the determination of the motions to dismiss." Id. at 5.[3] To preserve their claims, Plaintiffs could have sued BAS by October 16, 2002 as they had threatened in September.

Accordingly, the claims against BAS do not relate back to the filing of the Consolidated Complaint and are time-barred.

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[3] In any event, as discussed in the Moving Brief and Reply Brief, Plaintiffs' claims against BAS were time-barred by January 27, 2003. Moving Brief at 12; Reply Brief at 17.

Dated: April 1, 2004

Respectfully submitted,

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*** Signed by Charles G. King with permission**

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2004, a true and correct copy of the above and foregoing Supplemental Memorandum of Defendants Bank of America Corporation and Banc of America Securities LLC in Further Support of their Motion to Dismiss the First Amended Consolidated Complaint is being served upon all counsel of record by website, http://www.esl3624.com, pursuant to this Court's Order.

s/ Amanda Kosowsky

Amanda Kosowsky